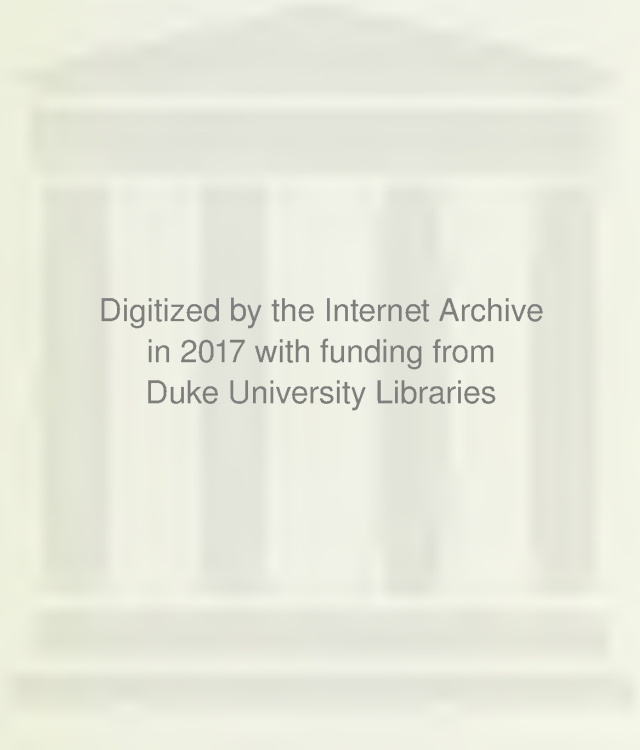

ARGUMENT

IN THE

MATTER OF THE APPLICATION

OF

ROTHSCHILDS & CO.

FOR THE

RELEASE OF TOBACCO

Seized at Richmond, Va.

AND NOW

HELD BY THE TREASURY DEPARTMENT.

HUGHES, DENVER & PECK, Counsel.

JANUARY, 1868.

WASHINGTON:
GIBSON BROTHERS, PRINTERS.

ARGUMENT.

To the Hon. Hugh McCulloch,

Secretary of the Treasury:

The undersigned, counsel for Rothschilds & Co., of Paris, France, have the honor to submit for your consideration, in connection with the pending application for the release of certain tobacco now held by the agents of the Treasury, and owned and claimed by said Rothschilds & Co., the following argument:

The claimants are the subjects of a friendly foreign State, domiciled in Paris, where they have remained from a time antecedent to the beginning of our civil war to its close, never having had even a temporary residence within the limits of the late Confederate States.

There is a subsisting treaty of commerce and navigation between France and the United States, which has been in full force for many years past. Under the laws of nations and under said treaty, the subjects of France were and are entitled to all the commercial rights guarantied to neutrals, and in this particular case those rights include absolute immunity from the capture or detention (except under the blockade) of their property, its confiscation, or its seizure under any of the acts of Congress made for the purposes of the war in the nature of acts of forfeiture.

The tobacco in question here, was bought before the war began; in the legitimate course of business.

A blockade was established by the United States Government, and respected by Rothschilds & Co., therefore their tobacco, of necessity, remained within the territory of the States in rebellion, until the close of the war.

It was then seized by the military authorities on the express ground that it was the property of aliens, and turned over to the Treasury Department. The military issued an order releasing the property of citizens, but declined to release this, because the owners were not citizens.

The Attorney General having delivered an opinion to the effect, that all property received by the Treasury agents from the military authorities as captured or abandoned, must be held under the provisions of the act of March 12, 1863, and the parties confined to the remedy by suit in the Court of Claims provided in that act, the question arises: Is this property within the terms of the act of Congress and the decision of the Attorney General?

It is to be remarked in passing, that no question upon the validity of this act, by reason of its approval eight days after the dissolution of Congress, was brought to the attention of the Attorney General, nor has that question, though distinctly raised since before the Treasury Department, yet been submitted to him for his decision. Meanwhile millions of dollars of meritorious claims, are suspended and postponed upon a very strict construction, and a stringent enforcement of an act of Congress which one branch of the national Legislature has declared void, and which cannot fail to be disregarded whenever subjected to the test of judicial examination.

But accepting the rules adopted by the Treasury Department for its guidance in cases of this kind, we proceed to consider the question stated above; does the tobacco of Rothschilds & Co. come within the terms of the act of Congress as construed by the Attorney General? That act of Congress is a municipal law of this commonwealth; its scope and operation affect only enemies and enemies' property. It cannot, by any just and fair intendment, be made to divest the well-defined and universally admitted rights of neutrals, founded on the laws of nations. For the rights of neutrals, the United States have hitherto stood forth as the special advocate and champion among nationalities. All departments of our Government ought to be slow to maintain that our municipal

laws are now to overrule and destroy them in their most vital particulars.

The Attorney General of the United States has resorted to the law of nations for authority to try citizens in time of war by Military Commissions. (See Opinion on the case of the assassins of President Lincoln—pamphlet—July, 1865.) His opinion on that subject was followed, and, whether wisely or not, is a precedent too recent and sealed with sanctions too solemn to be now repudiated by the same Administration.

Out of sundry passages of similar purport, we quote the following:

"Congress can declare war. When war is declared, it must be, under the Constitution, carried on according to the known laws and usages of war among civilized nations. Under the power to define those laws, Congress cannot abrogate them or authorize their infraction. The Constitution does not permit this Government to prosecute a war as an uncivilized and barbarous people." (Opinion, pp. 4, 5.)

Let us now turn to the law of nations to ascertain the rights of neutrals in time of war.

In Chancellor Kent's chapter "Of the various kinds of property liable to capture," (1st Commentaries, p. 83, *et seq.*,) it is laid down that the domicil of a party determines his nationality as to the question of neutral rights, and he says: "This same principle, that, for all commercial purposes, the domicil of the party without reference to the place of birth becomes the test of national character, has been repeatedly and explicitly admitted in the courts of the United States. If he resides in a belligerent country, his property is liable to capture as enemy's property, and if he resides in a neutral country he enjoys all the privileges, and is subject to all the inconveniences, of the neutral trade. He takes the advantages and disadvantages, whatever they may be, of the country of his residence. The doctrine is founded on the principles of national law, and accords with the reason and practice of all civilized nations."

The principle insisted on by the United States in their diplomatic correspondence with England, was, that neutrals

were of right entitled "to trade, with the exception of blockades and contrabands, to and between all ports of the enemy, and in all articles, although the trade should not have been opened to them in time of peace."

The trade with France, as before remarked, is regulated by a commercial treaty, and it was in time of peace that the property in question here was acquired.

It is not pretended that this tobacco was ever moved or intended to be moved in violation of the blockade, or that it was contraband of war.

The right of French subjects to trade with the people of the United States being recognized and regulated by the laws of nations and by treaty, cannot be taken away or impaired by our municipal laws.

The general commercial rights of neutrals have been thus stated by Lord Erskine, in his speech of March 8, 1808, upon the orders in council:

"The public law establishes, that countries not engaged in war, not interposing in it, shall not be affected by the differences of contending nations; but to use the very words of the eminent judge who now presides with so much learning and ability in the Court of Admiralty, (Sir William Scott, Lord Stowell,) 'upon the breaking out of war, it is the right of neutrals to carry on their accustomed trade, with an exception of the particular cases of a trade to blockaded ports, or in contraband articles, and of their ships being liable to visitation and search.'" (Upton's Maritime Warfare and Prize, p. 259.)

In Marten's Law of Nations, (p. 296,) it is said, that "war suspends all the laws of property between the belligerent powers, but not between them and neutral powers, so that although an enemy may seize on the property of an enemy, and dispose of it with all its appurtenances, still the right of the original proprietor does not cease as long as he has not expressly or tacitly renounced it, or as long as he has not given it up as lost." Vattel says that there are certain rules on which Europe seems to be generally agreed, and that "the first is, carefully to distinguish ordinary goods which have

no relation to war, from those that are peculiarly subservient to it."

"Neutral nations should enjoy perfect liberty to trade in the former; the belligerent powers cannot with any reason refuse it, or prevent the importation of such goods into the enemy's country; the care of their own safety, the necessity of self-defence, does not authorize them to do it, since those things will not render the enemy more formidable. An attempt to interrupt or put a stop to this trade would be a violation of the rights of neutral nations, a flagrant injury to them; necessity, as we have observed, being the only reason which can authorize any restraint on their trade and navigation to the ports of the enemy." (Vattel, Book 3d, chap. 7, sec. 112.)

"The effects of neutrals found in an enemy's ships, are to be restored to the owners, against whom there is no right of confiscation, but without any allowance for detainer, decay, &c." (Vattel, Book 3d, chap. 7, sec. 116.)

And to the same effect says Chancellor Kent: "The two distinct propositions, that enemy's goods found on board a neutral ship may lawfully be seized as prize of war, and that the goods of a neutral found on board of an enemy's vessel were to be restored, have been explicitly incorporated into the jurisprudence of the United States, and declared by the Supreme Court to be founded in the law of nations. The rule, as it was observed by the court, rests on the simple principle, that war gave a right to capture the goods of an enemy, but gave no right to capture the goods of a friend. The neutral flag constituted no protection to enemy's property, and the belligerent flag, communicated no hostile character to neutral property. The character of the property depended upon the fact of ownership, and not upon the character of the vehicle in which it was found." (Kent's Commentaries, vol. 1., p. 129.)

It will not be pretended that the rights of capture on land are more extended than at sea, and we assert with confidence that no authority can be found in the law of nations to warrant or excuse the capture and appropriation of the property of a neutral domiciled abroad in such a case as this.

The general principle is thus laid down by Grotius, and is too well established to require argument or admit of question: "This is plain, before the right of war can entitle us to anything taken, it is requisite that our enemy had first the true propriety of it; for what things may be within the enemy's garrisons, or towns, the owners thereof, being neither subjects to our enemies, nor at war with us, cannot by war be made lawful booty, as is proved, among others, by the saying of *Eschines*, that *Amphipolis* being a city belonging to the *Athenians*, could not lawfully be taken by King *Philip* in a war which he made with the *Amphipolitanes;* for there was no reason for it; and the changing of properties by mere force is too hateful to be produced." (Grotius, Book 3d, chap. 6, sec. 5.)

Other authorities might be mentioned, but enough have been cited to show that the property of a neutral, domiciled in neutral territory, is not enemies' property, nor the subject of capture under the laws of nations.

It is to be remembered that this claim was formally presented to the Government of the United States, through the legation of France, and comes to the Treasury Department from the State Department, having thus been transmitted, in the most orderly manner, as a claim of a foreign subject, the citizen of a friendly nation.

Is the claim to be adjudicated under the law of nations? If so, there can be little difficulty in arriving at a decision favorable to those whom we represent.

The Attorney General of the United States has declared, as I have shown above, that Congress has no power to abrogate or change the laws of nations.

As to the binding obligation of those laws, it may not be amiss to recall what some eminent authors have said.

Blackstone, in speaking of the law of nature, (which is the foundation of the law of nations, and from whence its most important principles are derived,) says: "This law of nature being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times; no

human laws are of any validity if contrary to this; and such of them as are valid derive all their force and all their authority, mediately or immediately from this original." (1st Blacks. Comm., p. 41.)

The law of nations, the same author tells us, "depends entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues and agreements, between these several communities; (independent nations,) in the construction also of which compacts we have no other rule to resort to but the law of nature; being the only one to which all the communities are equally subject, and therefore the civil law very justly observes, that *quod naturalis ratio inter omnes homines constituit, vocatur jus gentium.*" (Vol. 1, p. 43.)

"The law of nations," says Chancellor Kent, "so far as it is founded on the principles of natural law, is equally binding in every age and upon all mankind." (Kent's Commentaries, vol. 1, p. 4.)

Another author says: "What has been said concerning the law of nations, suggests several important reflections; among others, that, since the law of nations is in reality nothing else but the law of nature itself, there is but one and the same rule of justice for all mankind, to nations as well as individuals. And the nation which violates this law, is guilty of as great a crime as individuals, perhaps, a greater, since national wrong is attended with more unhappy consequences." (Burlamaqui, p. 218.)

"Since, therefore, the necessary law of nations consists in the application of the law of nature to states, which law is immutable, as being founded on the nature of things, and particularly on the nature of man, it follows that the necessary law of nations is *immutable*. Whence, as this law is immutable, and the obligations that arise from it necessary and indispensable, nations can neither make any changes in it by their conventions, dispense with it in their own conduct, nor reciprocally release each other from the observance of it." (Vattel, preliminaries, secs. 8, 9.)

If it be true, that Congress cannot rightfully alter or abridge the rights secured to nations or individuals by the

laws of nations, then it is not competent for that body by a municipal law to prescribe new definitions or conditions for captures and lawful booty, or to make that prize of war which was not so before under the laws of nations. Neither is it competent for Congress to compel neutrals to part with their property to the Treasury Department by seizures and captures unknown to the laws of nations, and to resort for redress to the Court of Claims, (within two years after the rebellion,) and to seek their remedy under a law fixing the measure of damages far below the compensatory standard.

It is to the executive departments of our government they must go for redress, and this is to be administered directly through the action of those departments themselves or indirectly through joint commissions, or other tribunals appointed for the purpose and governed in their adjudications by the laws of nations.

"There is no *permanent and general international court*, and it will be found that, in general, the sovereign or government of each state who has the power of declaring war and peace, has also as an incident, the sole power of deciding upon questions of booty, capture, prize, and hostile seizure, though sometimes that power is delegated, as in Great Britain, as respects maritime seizures, by commission to the judge of the Admiralty Court, with an appeal from his decision to the Privy Council. In these cases, no other municipal court has cognizance of any hostile seizure. *Elphinston* vs. *Bedreechund*, Knapp's reports, 316 to 361; and *Hill* vs. *Reardon*, 2 Russ. reports, 608, and further, *post* p. 392. So there is no general international court in which a treaty can be directly enforced, although, collaterally, its meaning may be discussed in a municipal court; therefore, no bill to enfore a treaty can be sustained in equity. *Nabob of Carnatic* vs. *East India Company*, 2 Vesey, jun., 56, and *Hill* vs. *Reardon*, 2 Sim. and Stu., 437, 2 Russ. Rep., 608." (Note to Vattel, p. 4.)

The Supreme Court of the United States, in the case of *the Venice*, decided in December, 1864, settled some important points as to the right of capture by the Union forces, after the occupation of rebel towns and territory, which seem to

be conclusive against any claim on the part of the government to the property now in question.

The following is a statement of the points resolved, taken from the official report of the case, in second Wallace's Reports, p. 258.

As we have adopted the method in this argument of quoting authorities at length, we also print in an appendix, in full, the opinion of the Court by Chief Justice Chase. We add, also, the opinion of the Attorney General in the Savannah cotton cases. The decision of the Supreme Court, will, of course, overrule the opinion of the Attorney General, wherever there is a conflict.

In this place, it is sufficient for our purpose to state the points decided:

1. The military occupation of the city of New Orleans by the forces of the United States, after the dispossession of the rebels from that immediate region in May, 1862, may be considered as having been substantially complete from the publication of General Butler's proclamation of the 6*th* (dated on the 1*st*) of that month; and all the rights and obligations resulting from such occupation, or from the terms of the proclamation, existed from the date of that publication.

2. This proclamation, in announcing, as it did, that "all rights of property" would be held "inviolate, subject only to the laws of the United States;" and that "all foreigners not naturalized, claiming allegiance to their respective governments, and not having made oath of allegiance to the government of the Confederate States," would be "protected in their persons and property as heretofore under the laws of the United States," did but reiterate the rules established by the legislative and executive action of the national Government, and which may also be inferred from the policy of the war, in respect to the portions of the States in insurrection occupied and controlled by the troops of the Union. It was the manifestation of a general purpose, which seeks the re-establishment of the national authority, and the ultimate restoration of States and citizens to their national relations under better forms and firmer guarantees, without any view of subjugation by conquest.

3. Substantial, complete, and permanent military occupation and control, as distinguished from one that is illusory, imperfect and transitory, works the exception made in the act of July 13th, 1861 (§ 5), which excepts from the rebellious condition those parts of rebellious States "from time to time occupied and controlled by the forces of the United States engaged in the dispersion of the insurgents;" and such military occupation draws after it the full measure of protection to persons and property consistent with a necessary subjection to military government.
4. The President's proclamation of 31st of March, 1863, affected in no respect the general principles of protection to rights and property under temporary government, established after the restoration of national authority.
5. Vessels and their cargoes belonging to citizens of New Orleans, or neutrals residing there and not affected by any attempts to run the blockade, or by any act of hostility against the United States, were protected after the publication of General Butler's proclamation, dated May 1st, 1862, and published on the 6th; though such persons, by being identified by long voluntary residence and by relations of active business with the enemy, may have themselves been "enemies" within the meaning of the expression as used in public law.

The second, third, and fifth of the above points certainly are conclusive to show the illegality of the seizure of the private property of neutrals; and that illegality, the court say, resulted not alone from the promise of protection contained in the proclamation of the military commander, but from "rules established by the legislative and executive action of the national government," and from "the policy of the war."

The act of Congress of March 12, 1863, as construed by the Attorney General, seems to introduce new rules whereby to determine the legality of captures, whereas the laws of nations must determine them, and the act of Congress must be interpreted to use the terms "captured property," in the established sense of the laws of war recognized by the civilized world. If the government of the United States is content to rest its title to captured property on the laws of nations, its only safe foundation, then the act of March 12,

1863, if free from other fatal objections, would have its legitimate operation in the disposal of abandoned or dereliet property, and of property lawfully captured by the laws of war, and therefore forfeited to the sueeessful belligerent. The remedy by suit in the Court of Claims, is thus easily eomprehended, as a provision made in view of the peeuliar eharaeter of the eontest, to exeept from the penalties and evils of the war the loyal citizens of the United States, and friendly foreigners who, by being domieiled in rebel territory, have beeome impressed, technically, with the eharaeter of enemies.

But if the aet is to be eonstrued as making a lawful capture of every taking of private property seized from citizens or resident foreigners by military foree, and turned over to the agents of the treasury; it is uneonstitutional and void, such eaptures being unsupported exeept by a munieipal law of the United States, made in violation of the guarantee that "no person shall be deprived of his property unless by due process of law," or in other words, by judieial proeeedings and sentenee.

But surely it will not be elaimed by those who go farthest to expand the powers conferred by this aet of Congress; that the National Legislature has solemnly deereed that neutrals domieiled within the dominions of a friendly foreign power and at no time resident in rebel territory, are publie enemies, and their property, aequired *ante-bellum* under the laws of the United States lawful booty! Yet, unless this position is assumed, and sustained by the exeeutive departments of our government, no sueh elaimant need ever be driven to the Court of Claims, or to any other court for his redress.

We do not at all admit that the opinion of the Attorney General goes any such length. We repeat, that no fair interpretation of the aet of Congress of Mareh 12, 1863, can extend it to the property of neutrals, and that it embraees only, and was intended only to inelude the property of belligerents and public enemies. Among "public enemies" we admit that the subjects of neutral powers, who have their

domicil within the territory of a belligerent during the war, are included by the laws of nations.

Our construction of the act is supported by the regulations made in pursuance of it, and to carry it into effect by the President of the United States and the Secretary of the Treasury, as well as by the terms of the act itself. The act includes only such property as was "abandoned," or "captured" within the insurrectionary States.

In the regulations, abandoned property is thus defined:

"First. That which has been or may be deserted by the owners; and second. That which has been or may be voluntarily abandoned by the owners to the civil or military authorities of the United States."

In the subsequent law of July, 1864, abandoned property is defined by the national legislature to be such as the owner shall have voluntarily abandoned, "and engaged in arms or otherwise in aiding or encouraging the rebellion." (13th Stats. at large, p. 376.)

Captured property is defined in the regulations, (pamphlet, p. 32,) to be "that which has been or may be seized or taken from hostile possession by the military or naval forces of the United States."

These definitions, comprehensive as is the latter, do not, either of them, reach the case under consideration, as the tobacco of the Rothschilds was neither abandoned property nor captured property within the sense of the Treasury regulations.

It is true, that in the opinion of the Attorney General, the expression is used in defining captured property, property "actually and hostilely seized and taken on land by a military officer or soldier of the United States, in a state or any portion of a state designated as in insurrection against the United States." (Opinion in the Savannah cotton cases.)

It is not to be presumed, in fairness, that the Attorney General intended by this language to extend the definition beyond the terms employed in the Treasury regulation; as, literally taken, and when the qualifying term "hostile," is applied to the *taking*, instead of the *possession* from which

the property is taken, it becomes simply a definition of robbery, nothing more.

But what is the remedy? The Attorney-General has advised the Secretary of the Treasury, that all property captured by the military forces and turned over to the Treasury Agents, is to be sued for in the Court of Claims—that the remedy provided in that Court is exclusive of all others, and in pursuance of this opinion the Secretary has declined to go into an investigation of the legality of captures, made in the ordinary way. Does this exclude the Secretary from granting summary relief in this case? If we have shown that the act of Congress only applied to enemies' property the question is answered. But were it otherwise, in this case the very fact of the illegality of the capture comes up *as a part of the report* of the military, for the refusal to release this property, and the act of turning it over to the Treasury Agent are made by the military commander upon the express ground that the tobacco is the property of an alien. Thus the rights of the claimants are manifest from the very same source that informs the Treasury of the seizure, and the question simply presents itself—shall the Department consummate and continue an invasion of neutral rights apparent on the face of the proceedings of the military authorities by their own report? We have already adverted to the fact that a different rule was laid down for citizens than the one applied to our clients, and that, in general, private property was returned to its owners at Richmond. We submitted a copy of the military order to that effect with our application for the release of the tobacco.

That order was entirely consistent with the standing orders of our army, with the usages of civilized warfare, and with the "policy of the war" as judicially recognized by the Supreme Court. The military commander had full power to issue it. It would present us in no very enviable light as a Government, to despoil the friendly neutral of his goods, in violation of law, and restore to the contumacious rebel the property taken from him to which a valid claim might have been made.

To sum up the whole matter, the case stands thus: A neutral trader, in time of peace, became the purchaser of American products, which he held under the protection of American law, as well as of the laws of nations. Civil disorders ensued, and our Government for a time was unable to enforce its authority in the district where the property lay. Instead of closing our ports, we declare and enforce a blockade, and while complaining of foreign powers for according belligerent rights to the formidable military power of the insurgent states, we, ourselves, admit them to the rights and inflict on them the injuries annexed to that condition. The neutral trader respects our blockade, and patiently awaits the termination of the war and the restoration of our authority. In war he is protected from spoliation by the law of nations—in peace he may claim, as his right, in which we are bound to maintain him, perfect immunity from forfeiture or detention. But we seize his property by military force, committing an act of spoliation, not making a lawful capture, and we hold it by a void act of Congress, made only for enemies and enemies' property. This is a process by which the status of an enemy in law, is made to depend, not on the voluntary act of the party himself nor the relation he sustains to our Government, but on the lawless acts of our own officers.

While such proceedings are very well calculated to make the unhappy victims of so barbarous a policy enemies in fact, they can never serve to convince enlightened reason that they constitute them enemies in law at the time of our aggressions upon them. We indulge the hope that a wiser and more just policy will prevail; and that a great nation, in the exhibition of sublime power to compel obedience to law on the part of individuals, will not forget to render the obedience to law due from it as one of the family of nations.

In conclusion, we beg leave to say, that this application is made to you, as Secretary of the Treasury, because you have the control of the property, the Department of State having formally notified the claimants that the whole matter rests with you, thus washing its hands of the business; and we indulge the hope that the questions presented, since they

have been devolved on the Treasury by the Secretary of State, may be met and decided with that frankness and candor which so eminently distinguish the present head of the Treasury Department; and that we may not receive for an answer, "that the property cannot now be released by the military authorities because it has passed under the control of the Treasury, and that it cannot be released by the Treasury because it was delivered over by the military," with a reference to the learned opinion of the Attorney General to demonstrate the legality and justice of the answer!

Respectfully submitted.

HUGHES, DENVER & PECK,

Counsel for Rothschilds & Co.

APPENDIX.

DECISION OF THE SUPREME COURT OF THE UNITED STATES IN THE CASE OF "THE VENICE."

The CHIEF JUSTICE delivered the opinion of the court.

This cause comes before us upon appeal from a decree of the District Court of the United States for the Southern District of Florida.

The schooner Venice, with a cargo of two hundred and twenty-five bales of cotton, was captured in Lake Ponchartrain by the United States ship-of-war Calhoun, on the 15th of May, 1862; was taken to Key West; was libelled as prize of war in the District Court; and was restored with her cargo, to the claimant, David G. Cooke, by its decree. The United States appealed. The claimant, Cooke, was a British subject, but had resided in New Orleans nearly all the time for ten years preceding the capture. He was a clerk in a large mercantile establishment until June, 1861, when the firm closed its affairs, and he turned his attention to other business, particularly to the collection of planters' acceptances which he had purchased, and to the investment of their proceeds in cotton. Early in April, 1862, he bought two hundred and five bales in Mississippi; and had them brought to New Orleans, where he purchased the Venice on the 9th of April. Finding that the two hundred and five bales would not fully complete the lading of the schooner, Cooke bought twenty bales more about the 12th of April. The whole was put on board with as little delay as possible, and on the 17th of April, the schooner was towed out into Lake Ponchartrain, and taken to the head of the lake, where she was anchored, and remained, with only such change of position as was necessary to obtain a supply of water, until

the capture. In the meantime the vessel was undergoing repairs.

While these transactions were in progress, the war was flagrant. The States of Louisiana and Mississippi were wholly under rebel dominion, and all the people of each State were enemies of the United States. The rule which declares that war makes all the citizens or subjects of one belligerent enemies of the Government and of all the citizens or subjects of the other, applies equally to civil and to international wars.* Either belligerent may modify or limit its operation as to persons or territory of the other; but in the absence of such modification or restriction judicial tribunals cannot discriminate in its application.

The vessel and the cotton at the time of purchase belonged to citizens either of Mississippi or Louisiana, and was therefore enemies' property.

Did the transfer to Cooke change the character in this respect of both or either?

Cooke was a British subject, but was identified with the people of Louisiana by long voluntary residence and by the relations of active business.† Upon the breaking out of the war, he might have left the State and withdrawn his means; but he did not think fit to do so. He remained more than a year, engaged in commercial transactions. Like many others, he seems to have thought that, as a neutral, he could share the business of the enemies of the nation, and enjoy its profits, without incurring the responsibilities of an enemy. He was mistaken. He chose his relations, and must abide their results. The ship and cargo were as liable to seizure as prize in his ownership, as they would be in that of any citizen in Louisiana, residing in New Orleans, and not actually engaged in active hostilities against the Union.

This brings us to the consideration of the events which transpired at New Orleans, and in its vicinity, very soon after the Venice was taken into Lake Ponchartrain.

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* Prize Cases, 2 Black., 666; concurred in by dissenting Justices, Id. 687–8.

† Prize Cases, 2 Black., 674.

The fleet of the United States, under command of Flag-officer, now Vice-Admiral, Farragut, reached New Orleans on the 25th of April, and the flag-officer demanded the surrender of the city, and required the authorities to display the flag of the Union from the public buildings. The mayor refused to surrender and refused to raise the National flag, but declared the city undefended and at the mercy of the victors. The flag-officer then directed the flag to be raised upon the Mint. It was raised accordingly, but was torn down on the same or next day. The flag of the rebellion still floated over the hall where the city authorities transacted business. On the 29th, the Union flag was raised again, both on the Custom House and Mint, and was not again disturbed. On the 30th, the flag-officer received from the mayor a note so offensive in its character, that all communication was broken off.* The power of the United States to destroy the city was ample and at hand, but there was no surrender and no actual possession.

The transports conveying the troops under the command of Major General Butler, commanding the Department of the Gulf, arrived on the 1st of May, and the actual occupation of the city was begun. There was no armed resistance, but abundant manifestations of hostile spirit and temper both by the people and the authorities. The landing of the troops was completed on the 2d of May, and on the 6th a proclamation of General Butler, which had been prepared and dated on the 1st, and the next day printed by some soldiers, in an office seized for the purpose, was published in the newspapers of the city. Some copies of the proclamation had been previously distributed to individuals, but it was not made known to the population generally until thus published. There was no hostile demonstration, and no disturbance afterwards; and we think that the military occupation of the city of New Orleans may be considered as substantially complete from the date of this publication; and

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* Message and Documents, 1862–3, part 3, pp. 282–288.

that all the rights and obligations resulting from such occupation, or from the terms of the proclamation, may be properly regarded as existing from that time.

This proclamation declared the city to be under martial law, and announced the principles by which the commanding general would be guided in its administration. Two clauses only have any important relation to the case before us. One is in these words: "All the rights of property, of whatever kind, will be held inviolate, subject only to the laws of the United States." The other is thus expressed: "All foreigners, not naturalized, claiming allegiance to their respective governments, and not having made oath of allegiance to the government of the Confederate States, will be protected in their persons and property as heretofore under the laws of the United States." These clauses only reiterated the rules established by the legislative and executive action of the national Government, in respect to the portions of the States in insurrection, occupied and controlled by the troops of the Union.

The fifth section of the act of July 13th, 1861, providing for the collection of duties and for other purposes, provided that, under certain conditions, the President, by proclamation might declare the inhabitants of a State, or any section or part thereof, to be in a state of insurrection against the United States. In pursuance of this act, the President, on the 16th of August following, issued a proclamation declaring that the inhabitants of the States of Virginia, North Carolina, Tennessee, Arkansas, and the other States south of these, except the inhabitants of Virginia west of the Alleghanies, and of those parts of States maintaining a loyal adhesion to the Union and the Constitution, "or from time to time occupied and controlled by forces of the United States, engaged in the dispersion of the insurgents," were in a state of insurrection against the United States.

This legislative and executive action related, indeed, mainly to trade and intercourse between the inhabitants of loyal and the inhabitants of insurgent parts of the country;

but, by excepting districts occupied and controlled by national troops from the general prohibition of trade, it indicated the policy of the Government not to regard such districts as in actual insurrection, or their inhabitants as subject, in most respects, to treatment as enemies. Military occupation and control, to work this exception, must be actual; that is to say, not illusory, not imperfect, not transient; but substantial, complete, and permanent. Being such, it draws after it the full measure of protection to persons and property consistent with a necessary subjection to military government. It does not, indeed, restore peace, or, in all respects, former relations; but it replaces rebel by national authority, and recognizes, to some extent, the conditions and the responsibilities of national citizenship.

The regulations of trade made under the act of 1861 were framed in accordance with this policy. As far as possible the people of such parts of the insurgent States as came under national occupation and control, were treated as if their relations to the national Government had never been interrupted.

It is true that the general exception from the prohibition of commercial intercourse, which has just been mentioned, was cancelled and revoked by the President's proclamation of the 31st of March, 1863, and, instead of it, a particular exception made of West Virginia, and of the ports of New Orleans, Key West, Port Royal, and Beaufort, in North Carolina. But this revocation merely brought all parts of insurgent States under the special licensing power of the President, conferred by the act of July 13, 1861. It affected, in no respect, the general principles of protection to rights and property under temporary government, established after the restoration of the national authority.

The same policy may be inferred from the conduct of the war. Wherever the national troops have re-established order under national rule, the rights of persons and of property have been, in general, respected and enforced. When Flag-officer Farragut, in his first letter to the rebel mayor of New Orleans, demanded the surrender of the city, and promised

security to persons and property, he expressed the general policy of the Government. So, also, when Major General Butler published his proclamation and repeated the same assurance, and made a distinct pledge to neutrals, he made no declaration which was not fully warranted by that policy. There was no capitulation. Neither the assurance nor the pledge was given as condition of surrender. Both were the manifestation of a general purpose which seeks the re-establishment of the national authority, and the ultimate restoration of States and citizens to their national relations, under better forms and firmer guaranties, without any views of subjugation by conquest. Hence, the proclamation of the commanding general at New Orleans must not be interpreted by such rules as governed the case of the *Ships taken at Genoa*.* Vessels and their cargoes belonging to citizens of New Orleans, or neutrals residing there, and not affected by any attempts to run the blockade, or by any act of hostility against the United States after the publication of the proclamation, must be regarded as protected by its terms.

It results from this reasoning that the Venice and her cargo, though undoubtedly enemies' property at the time she was anchored in Lake Pontchartrain, cannot be regarded as remaining such after the 6th of May; for it is not asserted that any breach of blockade was ever thought of by the claimant, or that he was guilty of any actual hostility against the national Government.

It is hardly necessary to add that nothing, in this opinion, touches the liability of persons for crimes or of property to seizure and condemnation under any act of Congress.

DECREE AFFIRMED.

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* 4 Robinson, 387.

[See *supra*, p. 135, *The Circassian*; a case, in some senses, supplctory or complemental to the present one.]

OPINION OF THE ATTORNEY GENERAL OF THE UNITED STATES IN THE SAVANNAH COTTON CASES.

ATTORNEY GENERAL'S OFFICE,
July 5th, 1865.

To the Hon. HUGH MCCULLOCH,
Secretary of the Treasury:

SIR—I have the honor to acknowledge the receipt of your letter of 17th ult., submitting for my opinion the questions that have arisen in your Department in the case of the "Savannah Cotton."

The circumstances under which the property in question came into the possession of the Government, are stated in your letter substantially as follows:

On the occupation of the city of Savannah, in December last, by the United States forces under Major General Sherman, some thirty-eight thousand bales of cotton were found stored there. This property was seized and taken possession of by the military authorities, and by them turned over to agents of the Treasury Department, as "captured property," pursuant to the provisions of the Acts of Congress of March 12, 1863, and July 2, 1864, (12 Stat. at large, 820; 13 Id., 375.) After it was thus received by the appropriate agents, the property was forwarded to New York, and there sold at auction, as provided by law.

You state that a number of claims for the proceeds of the sales are now being presented to your Department, some of the claimants being residents of Savannah, who aver that they have been loyal to the Government during the Rebellion; others being subjects of foreign governments, resident in Savannah or abroad, averring that they were neutral during the late conflict; others again being Northern merchants, stating that they came into possession of the cotton claimed by them in payment of, or as security for, debts contracted prior to the Rebellion; and still others claiming restitution of their property, or its proceeds, on the ground that the

cotton in question was not capturable, or properly "captured property," and should not be held and treated as such.

The first question arising on this state of facts that you submit, is, whether the property to which reference has been made should or should not be regarded as "captured" under the acts of Congress of March 12, 1863, and July 2, 1864.

I do not perceive that either of the statutes provides what property shall be regared as "captured property," within the meaning of the law.

A definition of "abandoned" property, however, is contained in the 1st section of the act of 1864. That statute provides that "*property*, real or personal, shall be regarded as *abandoned* when the lawful owner shall be voluntarily absent therefrom, and engaged, either in arms or otherwise, in aiding or encouraging the Rebellion." (13 Stat. at large, 376.)

But I apprehend that there need be no difficulty in determining, for our present purposes, what property is comprehended by the phrase "captured property," as used in these Statutes; for the phrase is its own sufficient explanation. I suppose that all movable property, other than that species described by the proviso to the 1st section of the act of 1863, *actually and hostilely seized and taken* on land, by a military officer or soldier of the United States, in a State or any portion of a State designated as in insurrection against the United States, may be regarded as "captured," within the meaning of the Statutes of 1863 and 1864. I do not intend to say that no other property than that I have thus endeavored to describe, may be denominated and treated as "captured property," under these Statutes. It would seem by the 7th section of the act of 1864, that certain property seized and taken by *naval* forces, viz: property seized by the *Navy* "upon any of the inland *waters* of the United States," may be dealt with in the manner provided by the laws under consideration, (13 Stat. at large, 377.) Whether this section takes away the prize jurisdiction of the Courts in all cases of seizure of water-borne property on the inland waters of

the United States, effected there by naval commissioned captors, and commits all jurisdiction over such cases to the Court of Claims and to Congress, must remain for judicial determination. But the Supreme Court has recently decided that private property seized by a naval force on land bordering upon one of the inland waters of the insurrectionary South, was not the subject of prize jurisdiction, and was receivable by the Treasury agents under the Statute of 1863. (W. S. *v.* 72 Bales of Cotton, Dec. S., 1864, No. 360.) This decision was rendered in a case to which the act of 1864 did not apply, the capture then considered having been made prior to the passage of that Statute. I refer to it for the purpose of showing that certain cases of purely naval capture must pursue the course indicated in the Statute for the collection of abandoned and captured property. I have said that property *seized* or *taken* by any military person in the insurrectionary territory is denominable as "captured;" but the 6th section of the act of 1863 would seem to affix that character to "*cotton*, sugar, rich, and tobacco," *received* by any United States officer or soldier within insurrectionary districts. The section provides that it shall be the duty of every officer or private soldier, who may take or *receive* abandoned property, or any cotton, sugar, rice, or tobacco, from persons in insurrectionary districts, or *have such property under his control*, to turn the same over to an agent of the Treasury Department; and it further provides that refusal or neglect to do so shall subject such an officer or soldier to trial and punishment. (12 Stat. at large, 821.)

Property of the foregoing character thus turned over to a Treasury agent, and in that manner "*received*" by him, must be dealt with as the 2d section of the act provides; that is, it must be sold, and its proceeds paid into the Treasury, there to await the action of the Court of Claims, when duly invoked.

Thus it appears that all *cotton*, received by, or that may have come under the control of any military officer or soldier, whether it was actually seized or captured by him or not, *must* be dealt with as "abandoned or captured property."

I may have occasion hereafter to comment upon the effect of this provision.

The Statute, it may be said, thus affixes to all *cotton*, as well as all the other articles above stated, that may be under the control of a military or naval officer in the insurrectionary districts, the *de jure* character of "captured" property, and when such property is received by a Treasury officer, appointed to execute the provisions of the Acts of 1863 and 1864, it becomes, it may be said, *de facto* "captured" property, and must be disposed of accordingly.

I am of opinion, therefore, that the cotton found by our army at Savannah, taken possession of there by the military authorities, and received from them by the agents of the Treasury Department, is, and should be, regarded as *de facto* and *de jure* "captured" property, under the Statutes of 1863 and 1864.

The second question which you propound is, whether, if this property be of the character that I am of opinion it is, the power rests with the Secretary of the Treasury or the President to appoint a commission to examine the claims, and restore to loyal claimants the proceeds of so much of the property in question, as they can show to have been legally theirs.

I am of opinion that neither the President, nor any other Executive Officer, can restore, or authorize such a commission as you suggest, to make restoration of the proceeds of their captured property to these loyal claimants. Congress, by the legislation under consideration, has reserved to itself the power of finally disposing of the claims of the alleged owners of this property; and so long as that legislation exists, the claimants must pursue the remedy which it indicates for the establishment and enforcement of their rights. By the Constitution, Congress has exclusive power "*to make rules concerning captures on land and water.*" The present legislation, I apprehend, is clearly an exercise of that power. This is a general and comprehensive sovereign prerogative. Under other systems of Government, the authority to make such rules may be exercised by the political department. But in

this country the Legislative Department of the Government possesses exclusive authority both to establish rules for the regulation of the right of capture in time of war, and also to provide the method by which all questions touching captures may be determined.

The present legislation is not so much a regulation of the right of capture, though the 6th section of the Act of 1863 may be interpretable as authorizing, if not commanding, the seizure of certain kinds of property found by our military forces within the hostile districts of the South—as it is a provision for the judicial ascertainment of the rights of persons affected by captures that may have been, or may be, made in the progress of our belligerent operations set on foot for the reduction of the rebellious Southern country. Congress took notice of the *fact* that captures of private property on land had been made, and would continue to be made, by the armies operating in and against that terrritory, as a necessary and proper means of diminishing the wealth, and thus reducing the power of the insurgent rulers. It was not expected that such captures had been, or would be, in all cases, well and wisely made, or that in the course of such predatory hostility the innocent would not sometimes suffer as well as the guilty. Nor was it thought well that the administration, so to speak, of so much of the property within the enemies' territory as might be reduced into the the possession of the military forces, should be controlled by or under Executive authority.

In this view of existing facts and of just policy, the system provided by the act of 1863, was devised for the adjudication and decision of the cases contemplated by the Statute.

The Secretary of the Treasury was authorized to appoint agents to "*collect all abandoned or captured property*" in the enemies' country. To secure faithful and honest performance of their duty, the Secretary was authorized to require such agents to give bonds in such amounts as he might deem necessary. The duty of the agents was to receive all property in the insurgent States, which was, in fact, *captured* or *seized* out of the enemies' possession by the military authorities. They had no duty or power to inquire whether or not such

property had been rightfully captured—whether the Generals who reported it to them for collection had observed, in effecting the captures, what are called the "recognized usages of war," or had violated all the principles of writers on what is styled the Law of Nations, supposed to tend against the right of seizing private property on land, but it was the duty of the Treasury agents simply to receive all property reported to them as having been captured, irrespective of any considerations touching the legal exemption of any of it from seizure, and to dispose of it in the manner provided by the law. After the conversion of the property into money, the proceeds were directed to be paid into the Treasury. The words of the Statute are "the proceeds thereof *shall be* paid into the Treasury of the United States." But these proceeds do not pass into the Treasury as proceeds of property sold under a judicial sentence of confiscation. They are not sequestered or condemned, but simply held by the United States, so to speak, *in trust* for those who may, in the manner provided and in the time limited by the law, ultimately establish a legal right to receive them after pacification. When the insurrection has been suppressed, the owners are authorized to invoke the jurisdiction of the Court of Claims, and obtain there an adjudication of their respective claims. The proceeds of the property are thus in the possession of the United States, subject to the adjudications of that Court; and when it shall have passed upon the claimants' rights, and decreed in their favor, Congress has solemnly declared that they shall receive restitution of their property. In the presence of such legislation—covering, as it does, the entire subject matter; providing for the safe custody of the property in question pending hostilities, and for the final judicial determination of the rights of the parties in interest—I cannot see that the Executive has power to make a different disposition of the property from that provided by Congress, or authorize any one to determine the questions which Congress has entrusted to the decision of another forum. I am, therefore, of opinion, in reply to your inquiry, that jurisdiction cannot be conferred upon a commission, appointed either

by the President or Secretary of the Treasury, to examine the claims in question, and to make restoration of the proceeds of so much of this cotton as may belong to legal claimants.

The third and last question, you propound, is what disposition should be made of the proceeds of the sales of the property.

I think that it is your duty to see that the direction of the act of Congress is obeyed by those in whose hands these proceeds may be. The Statute says that after the sale of any abandoned or captured property, *"the proceeds thereof shall be paid into the Treasury of the United States."*

I am of opinion, therefore, that the proceeds of the property in question should be paid into the Treasury, there to await the action of the Court of Claims, and of Congress.

Very respectfully,

Your obedient servant,

JAMES SPEED,

Attorney General.